THE UNDER SECRETARY OF LABOR

WASHINGTON, D. C.
20210

In the Matter of Kathleen Humphrey Complainant, v. 'Arts Development Council, of Milwaukee County, Inc. and Milwaukee County, WI.) Respondents	)	Case No. 80-CETA-32

Decision and Order

The above-captioned matter was remanded to the Secretary by the United States Court of Appeals for the Seventh Circuit[1] for further consideration of an appropriate remedy in this case.

The case arose under the Comprehensive Employment and Training Act of 1973 as amended[2] (the Act or CETA), and the regulations issued thereunder and in effect at the pertinent times.[3] The Court of Appeals asserted jurisdiction pursuant to 29 U.S.C. § 817(a) (Supp. II 1978). The court reviewed the Administrative Law Judge's decision which the Secretary

[1] Milwaukee v. Secretary of Labor, 69.6 F.2d 997 (7th Cir. 1982) Decision without a Published Opinion, Docket No. 82-1697, November 26, 1982.

[2] Pub. L. 93-203, 87 Stat. 839. codified at 29 U.S.C. § 801 et seq., (1973). Pub. L. 95-524, 92 Stat. 1909. (1978)

[3] 29 C.F.R. Part 98 (1978)

had declined to review and which subsequently became the final decision of the Secretary. The ALJ concluded that the procedure leading to the complainant's dismissal from the CETA program in which she was employed violated the applicable CETA regulations. The decision provided for the complainant to elect her remedy between reinstatement at a comparable position in the CETA program for a period of six months, or an award of back-pay for a period of six months.

The court affirmed the decision that the procedure used to terminate the complainant violated the CETA regulations but vacated the award, remanding the case to the Secretary for further consideration of an appropriate remedy in the case.

Statement of the Case

The complainant was hired to participate in a sculpture project operated by the Arts Development Council of Milwaukee County, Inc., (ADC) in October 1977. ADC was a subgrantee of Milwaukee County, the CETA prime sponsor in that geographic region. At the time of her employment, the complainant was advised that the project was anticipated to continue for eleven months, or through September, 1978. In January, 1978, the complainant along with the other CETA participants in the sculpture project were orally advised that there would be a competitive jurying of their work and that a poor review could lead to dismissal from the project. The participants were not given written notice of the jurying process nor were they advised of

the Criteria to be used by the jury in its evaluation of their work.

As a result of the jurying, the complainant was told that she was being dismissed from the project. There is evidence that the jury considered not only the work product of the participants, but also their character and work habits as well.

The court, concurring with the Secretary's decision, concluded that the process used by the ADC to dismiss the complainant violated the notice provision required by the CETA regulations in an adverse action, as well as denying the complainant an opportunity to present her position to the dismissal-determining body.[4/] The court vacated the award provision of the decision which offered the complainant her choice of remedies.

Issues

1. What is an appropriate remedy for a discharged CETA

4/ 29 C.F.R. § 98.26

> Procedures for' resolving issues between grantees and complainants.
>
> (a) Each prime sponsor or eligible applicant shall establish a procedure for resolving any issue arising between it (including any subgrantee or subcontractor of the prime sponsor) and a participant under any Title of the Act. Such procedures shall include an opportunity for an informal hearing, and a prompt determination of any issue which has not been resolved. When the prime sponsor or eligible applicant takes an adverse action against a participant, such procedures shall also include a written notice setting forth the grounds for the adverse action and give the participant an opportunity to respond. (1978)

participant when the termination procedure did not comply with CETA regulations?

2: If back pay is an appropriate remedy, for what time period should it be awarded?

Discussion

1. The Court recognized that the Secretary has broad discretion to remedy wrongs perpetrated in CETA cases. See Milwaukee County v. Peters, 682 F.2d 609 (7th Cir. 1982). The court found, however, that the Secretary did not have the authority to provide the complainant with the unilateral right to choose between the possibie remedies of either reinstatement or back pay. If back pay is to be awarded, the Secretary has the responsibility to support such an award as necessary and appropriate to vindicate the specific deprivation suffered by the complainant. The court cited City of Philadelphia v. U.S. Department of Labor, 723 F.2d 330 (3d Cir. 1983) wherein that court stated while back pay is permissible in CETA cases, it is not a presumptive remedy (at 333). In New York Urban Coalition, Inc. v. U.S. Department of Labor, 731 F.2d 1024, 1031 (2d Cir. 1984), the court held that ".. . [improper] procedures have no independent value worthy of compensation, absent proof of actual loss flowing only from the procedural deprivation. . . . Thus consideration of an employee's procedural rights may not be totally divorced from

consideration of the underlying substantive reasons for the employer's action," (citing County of Monroe, FL v. U.S. Department of Labor, 690 F.2d 1359 (11th Cir. 1982)).[5/]

The courts have sustained the Secretary's authority to award back pay when the procedural defect was the cause of the loss of wages. That is, where the procedural defect precluded the participant from presenting his or her side of the dispute and the act or action being censured was not so clear on the face of it that it warranted immediate dismissal. In these cases, the courts have sustained the Secretary's authority to award back pay until either the defect was corrected, or the participant could have been lawfully terminated without the effect of the procedural defect. City of Chicago v. U.S. Department of Labor, 737 F.2d 1466, 1473 (7th Cir. 1984); Commonwealth of Kentucky, Department of Human Resources v. Donovan, 704 F.2d 288 (6th Cir. 1983); See also, In the Matter of Allen Gioielli 79-CETA-148, Secretary's Order dated January 18, 1982; Tibbetts and Bremmer v. Vermont Comprehensive Employment and Training Office, 81-CETA-254,255, Secretary's Order, dated July 25, 1984.

In the present case, the complainant was not provided with the notice required by the regulation, and was not given the opportunity to challenge the termination before the decision-

[5/] See City of Boston v. Secretary of Labor, 631 F.2d 156 (1st Cir. 1982); Carey v. Piphus, 435 U.S. 247 (1978).

makers. Only the loss of wages that she suffered as a result of these procedural defects may be remedied here. The complainant was entitled to continue in her employment as a CETA participant until she had been afforded written notice setting forth the grounds for an adverse action and the opportunity to respond. A back pay award is a proper remedy for the loss of wages and such award supports the purposes of CETA which, inter alia is "... to provide ...employment opportunities for economically disadvantaged, unemployed and underemployed persons. ..." Pub. L. 93-203, Section 2. Regulations issued thereunder at 29 C.F.R. Part 98 required, inter alia, the use of fair procedures in adverse actions against CETA participants, who were not to be terminated or treated in an arbitrary or capricious manner which would undermine the purposes of the Act.

Although the original decision inappropriately gave the complainant her choice of remedies,, a back pay award would have been appropriate and necessary at the time of the original decision to make complainant whole in light of the procedural deprivation she sustained.

2. Finding back pay to be an appropriate remedy to make the complainant whole, it then becomes necessary to fix the time period for the award. The ALJ determined that a six month period would be appropriate, for that length of time would cover from

the date the complainant was wrongfully terminated through the project's termination at which time the complainant could have been lawfully terminated. However, the record does not conclusively establish that the complainant's employment would have continued for the full term of the project, but for the procedural violation with regard to her termination.

Likewise, there is nothing in the record, to support an allegation that the factors used to terminate the complainant's participation in the project were arbitrary or capricious. Apart from the juried sculpture piece, the complainant's work attitude and absenteeism were critical factors. It appears from the record that the complainant had not been adequately advised of the factors concerning her termination until after April 1, 1978, the date of her termination. However, the record supports a conclusion that the complainant was fully aware of the factors concerning her termination and was given an opportunity to respond by July 28, 1978, the date she appeared before the prime sponsor, the Milwaukee County Executive Office for Economic Resource Development.

On August 29, 1978, the complainant was formally advised by the prime sponsor of its determination to uphold her termination, and provided her with the information by which she could appeal this action. This notice satisfied the regulations at 29 C.F.R. § 98.26(d).[6/] Although more than a month elapsed from the time

[6/] Final determinations made as a result of the review process shall be provided to the complainant in writing. Such notice shall include the procedures by which the complainant may appeal

of the hearng until the.date of the notice, the delay was to permit the prime sponsor's Hearing Officer to review certain evidence pertaining to the jurying process and to submit his findings and recommendations to the prime sponsor. I will therefore use the date of the final determination notice to the complainant as the constructive date of termination.

The award of back. pay to the complainant is therefore to run from April 2, 1978 to and including August 29, 1978.

In briefs before me the respondents requested that any unemployment benefits received by the complainant during the back pay award period should be deducted from the award. This is denied. If the state wishes to recoup the benefits it paid to the complainant during the period for which she will now be receiving the back pay award, it may do so. In not reducing the back pay award by unemployment benefit payments, I am following the general rule enunciated by the U.S. Supreme Court in an analagous situation arising under the National Labor Relations Act,[7] as well as the U.S. Court of Appeals for the Third Circuit, which declined to deduct unemployment compensation in computing back pay awards under Title VII

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[6] (continued)
the final determination, set forth in Subpart C of this Part. No individual or organization subject to the issue resolution requirements of this section may initiate the hearing-procedures of subpart C of this Part until all remedies under this section have been exhausted. (1978)

[7] Cf. N.L.R.B. v. Gullet Gin Co., 340 U.S. 361 (1951)

of the Civil Rights Act, 42 U.S.C. § 2000(e) et seq.[8] It would also be contrary to the policy regarding back pay awards set forth by the Department which specifically precludes the deduction of unemployment compensation from back pay awards.[9]

In the ALJ's original decision, interest was provided at a six (6%) percent per annum rate. Given today's economic realities this rate is not appropriate if the complainant is to be made whole, and the applicable interest rate is modified in the Order section, below.

The complainant also claims to be out of pocket for materials and items that she purchased for the project that she prepared for the jurying. These sums should be repaid.

ORDER

1. The complainant is awarded back pay from April 2, 1978 through August 29, 1978. This amount is to include .any annual leave, or vacation pay that may have been due her, as well as all fringe benefits or salary increases that may have gone into effect during that period, less all legal deductions.

2. Respondents shall pay interest on the back pay award from August 29, 1978 until the date of payment. The. interest rate(s)

[8] Cf. Craig v. Y 6 Y Snack, Inc., '721 F.2d 77 (3d Cir. 1983).

[9] U.S. Department of Labor, Employment and Training Administration Field Memo 100-82, June 22, 1982. Reinstatement and Payment of Back Wages... p. 6.

shall be the rate(s) used by the Department of Labor for monies owed to it for the appropriate periods.

3. The complainant shall be reimbursed for the cost of items or materials purchased by her for the jurying held in March, 1978 and for which she has not already received payment. The complainant must present receipts for such purchases but in any event, may not recover more than $100 for these costs.

4. All of the records of the respondents pertaining to the complainant are to be amended to reflect this decision and order.

Under Secretary of Labor

Dated: MAY 13 1985
Washington, D.C.